UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CAREER SYSTEMS DEVELOPMENT CORPORATION, Plaintiff(s), v. AMERICAN HOME ASSURANCE COMPANY, Defendant(s).	No. C 10-2679 BZ **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Before the Court are the parties' cross motions for summary judgment.[1] Docket Nos. 44 and 50. The issue is whether defendant American Home Assurance Company breached its duty to defend its insured, plaintiff Career Systems Development Corporation, in two underlying lawsuits. The lawsuits were filed by two independent contractors, Geoffrey E. Woo-Ming and Darlene Hoyt, after their contracts for services were terminated by plaintiff. Defendant initially defended both actions, but then withdrew, forcing plaintiff to

[1] The parties have consented to the Court's jurisdiction for all proceedings, including entry of final judgment under 28 U.S.C. § 636(c).

incur fees and costs in defending itself. Plaintiff, who prevailed in both lawsuits, now seeks to recover its fees and costs. For the reasons explained below, **IT IS HEREBY ORDERED** that plaintiff's motion is **GRANTED** and defendant's motion is **DENIED**.

Defendant first argues that it did not have a duty to defend plaintiff because both underlying complaints failed to allege a covered claim under the insurance policy. The policy at issue provided plaintiff with coverage for personal and advertising injury arising from "[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services," (i.e., coverage for defamation). Bellasis Declaration, Ex. 2 at 112. In his second amended complaint,[2] Woo-Ming, who was representing himself, alleged that plaintiff, "through its agents, lied and made false and damaging statements concerning Woo-Ming's termination," such as accusing him of sexual misconduct, which caused irreparable harm to his professional reputation.[3]

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[2] Plaintiff requests that the Court take judicial notice of the following documents filed in the Woo-Ming and Hoyt lawsuits: (1) the underlying complaints, including all amended complaints; (2) Hoyt's verdict form; and (3) a minute order granting plaintiff summary judgment in the Woo-Ming action. Docket No. 46. Defendant does not object to this request and it is therefore **GRANTED** to the extent that the documents are used in the Court's analysis.

[3] Woo-Ming's form complaint alleged that plaintiff was liable for: (1) breach of contract; (2) wrongful termination of public policy; (3) intentional infliction of emotional distress; and (4) intentional interference with prospective economic advantage. Plaintiff prevailed in this action after the Court granted its summary judgment motion. Ex. 8. The Court's order found that Woo-Ming was an independent

Hoyt's factual allegations from her second amended complaint included the claim that plaintiff's supervisor subjected her to a series of harassing comments and actions that harmed her reputation, such as accusing her of working outside of her contract without permission, improperly billing her time, and telling a co-worker that she was having a nervous breakdown due to the harassment.[4]

The above allegations from Woo-Ming and Hoyt triggered defendant's duty to defend because they created the potential that both claimants could have recovered for the alleged defamatory statements made by plaintiff's agents. See Montrose Chem. Corp. v. Superior Ct., 6 Cal.4th 287, 300 (1993)(holding that the duty to defend is broad and the insured "need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*"). Contrary to defendant's argument, the duty to defend in California does not require the underlying lawsuits to specifically allege defamation as a cause of action for there to be coverage. Scottsdale Ins., Co. v. MV Transp., 36 Cal.4th 643, 654 (2005)("that the precise causes of action pled by the third-party complaint may fall outside policy

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contractor. Id.

[4] Hoyt's lawsuit alleged the following causes of action against plaintiff: (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; (3) wrongful termination in violation of California Government Code § 12940 and in violation of public policy; (4) intentional infliction of emotional distress; (5) negligence; and (6) violation of the Unruh Civil Rights Act. The jury found that Hoyt was not plaintiff's employee and plaintiff was not liable under any of her causes of action. Ex. 7.

coverage does not excuse the duty to defend where, under the facts alleged, reasonably inferable, or otherwise known, the complaint could fairly be amended to state a covered liability"); Barnett v. Fireman's Fund Ins. Co., 90 Cal.App.4th 500, 510 (2001)(citing CNA Cas. of Calif. v. Seaboard Surety Co., 176 Cal.App.3d 598, 606-607 (1986))("the duty to defend arises when the facts alleged in the underlying complaint give rise to a potentially covered claim regardless of the technical legal cause of action pleaded by the third party").

Pursuant to Scottsdale and Barnett, it was also not necessary for Woo-Ming and Hoyt to have pled all of the elements of defamation to trigger defendant's duty to defend. Defendant's contention that Lindsey v. Admiral Insurance Company, 804 F.Supp. 47, 52 (N.D. Cal. 1992), requires all elements of a covered cause of action to be pled before coverage attaches, misreads Lindsey and was rejected in Barnett.[5] Barnett held that the claimant's allegation that defamatory statements were published was sufficient to trigger the duty to defend and there was no requirement for the claimant to have also pled that the statements were false. 90 Cal.App.4th at 510. See also Elecs. For Imaging, Inc. v. Atlantic Mutual Ins. Co., 2006 WL 3716481 at *4 (N.D. Cal. 2006)(declining to follow Lindsey because it did not address controlling California law and relied on only one case,

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[5] The dicta on which defendant relies was uttered in the context of a complaint for harassment which alleged none of the elements of a claim for defamation, especially the uttering of a false statement of fact.

Lunsford v. American Guarantee & Liability Insurance Company, 775 F.Supp. 1574 (N.D. Cal. 1991), which was later reversed by the Ninth Circuit).

Defendant correctly points out that it is not entirely clear from Woo-Ming's complaint that the allegedly defamatory statements were published to a third party, as opposed to having been said only to Woo-Ming. Likewise, it is not entirely clearly from Hoyt's complaint whether defendant made some of the allegedly defamatory statements or Hoyt implied them from other statements or conduct. Nor is it alleged that the statement that Hoyt was experiencing a nervous breakdown was false. Under California law, when faced with allegations that create a potential for coverage, the insured has a duty to investigate. See CNA Casualty, 176 Cal.App.3d at 610 ("Before an insurer may rightfully reject a tender of defense, it must investigate and evaluate the facts expressed or implied in the third party complaint as well as those which it learns from its insured and any other sources")(internal citations and quotations omitted). Here, defendant did initially provide a defense to both actions, during the course of which it reviewed discovery that was conducted with respect to Woo-Ming and Hoyt. In a letter informing plaintiff that it was denying coverage and would be withdrawing from defense of the Hoyt action, defendant acknowledges its duty to investigate and summarizes what it has learned about the coverage issues from discovery, including from Hoyt's deposition and her responses to interrogatories. See Stinson Declaration, Ex. 2. Nowhere does it mention that it has

learned that the Hoyt statements were not published or were true. The same is true for the Woo-Ming action. Nowhere in defendant's investigation of Woo-Ming's claim does it appear that defendant learned that the allegedly defamatory statements were not published. See Bergen Declaration, Ex. 1; Stinson Declaration, Ex. 2. It therefore appears that after conducting its discovery and investigation, the potential in Hoyt and Woo-Ming still existed for a defamation claim. Yet in each case, defendant withdrew from its defense.

Nor can, defendant escape its duty to defend by arguing that plaintiff had valid defenses to Woo-Ming and Hoyt's defamation allegations. Although plaintiff may have eventually prevailed at trial by establishing that the alleged statements were not defamatory because they were "rhetorical hyperbole" or privileged under California Code § 47c, the availability of valid defenses does not relieve the insurer from the responsibility of defending its insured. See Garriott Crop Dusting Co. v. Superior Court, 221 Cal.App.3d 783, 796 (1990)("the duty to initially defend Garriott exists regardless of potentially meritorious defenses to the City's claims"); Horace Mann Ins. Co. v. Barbara B., 4 Cal.4th 1076, 1086 (1993)("If Barbara B's claims were indeed so insubstantial as not to warrant any damages, Horace Mann should have raised that defense in the underlying action for [the claimant's] benefit, rather than in this declaratory relief action to his detriment").

I therefore find that plaintiff has established that Woo-Ming and Hoyt's complaints contained factual allegations that

raised the possibility of coverage under the policy (e.g., Having concluded that there was a potential for coverage under the policy, the next issue is whether any of the policy's exclusions applied to Woo-Ming and Hoyt's lawsuits. Under this analysis, the burden is on defendant to prove that the underlying claims were specifically excluded by the policy. MacKinnon v. Truck Ins. Exch., 31 Cal.4th 635, 648 (2003)(citing Aydin Corp. v. First State Ins. Co., 18 Cal.4th 1183, 1188 (1998)). Exclusionary clauses are strictly construed and must inform the insured about the exclusion in "clear and unmistakable language" to be effective. Id. (citations omitted).

According to defendant, the Employment Related Practices (ERP) exclusion allowed it to not defend plaintiff against the underlying lawsuits. This exclusion provided that the policy did not apply to:

> "Bodily injury" to:
> (1) A person arising out of any:
> (a) refusal to employ that person;
> (b) termination of that person's employment; or
> (c) employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person...
> This exclusion applies:
> (1) Whether the insured may be liable as an employer or in any other capacity...

Bellasis Declaration, Ex. 1 at 41.

Plaintiff contends that this exclusion only applies to lawsuits filed by employees and does not exclude lawsuits filed by independent contractors. It relies on North American Building Maintenance, Inc. v. Fireman's Fund Insurance Company

which held that a similar ERP exclusion did not apply to a lawsuit filed by employees of the insured's independent contractor. 137 Cal.App.4th 627, 642-44 (2006). NABM explained that the term "as an employer or in any other capacity" was ambiguous and found that a reasonable understanding of the language in the exclusion is that it only relates to actual, former, or prospective employees which does not include the employees of an independent contractor. Id. Other courts have reached a similar conclusion when interpreting analogous ERP exclusions. See e.g., National Union Fire Ins. Co. of Pittsburgh Pa. v. Starplex Corp., 188 P.3d 332, 349 (Or. App. 2008)(holding that the ERP exclusion did not apply to claims filed by employees of the insured's independent contractor).

Defendant, however, argues that the ERP exclusion bars coverage for all employment-related claims, including those filed by independent contractors who are essentially in an employment relationship with the insured, relying on Insurance Commissioner v. Golden Eagle Insurance Company, an unpublished decision from the California Court of Appeal. 2007 WL 908519 (Cal. App. 2007). In Golden Eagle, the insured claimed it was owed a defense because the employee who sued was not its employee but that of a sister company and therefore the ERP exclusion did not apply. Id. at *5. The Golden Eagle court assumed the underlying claimant was employed by the sister company, but found that this was a distinction without a difference because there "is no requirement in either version of the ERP exclusion that the 'person' bringing such

employment-related complaints be an employee of the insured." Id. at *6. One of the reasons Golden Eagle distinguished NABM, which was brought to its attention by the insured during oral argument, was that in NABM it was clear, unlike in Golden Eagle, that the claimant worked for a separate entity that had no relation to the insured. Id. at *7-8.

I follow NABM and find that the ERP exclusion does not apply to Woo-Ming and Hoyt's claims. First, NABM is the controlling authority. Both parties agree that I am to apply California law to this dispute. Under California Rule of Court 8.1115, unpublished decisions from the California Court of Appeal, such as Golden Eagle, cannot be cited or relied upon by a court or a party in any action. See Jimeno v. Mobil Oil Corp., 66 F.3d 1514, 1529 n. 8 (9th Cir. 1995); Quintero v. U.S., 2011 WL 836735 at *3 (E.D. Cal. 2011).[6] Second, Golden Eagle addressed NABM without the issue being briefed by the parties. Furthermore, Golden Eagle considered whether the ERP exclusion applied to a claimant that may have been an employee of both the insured and another entity rather than an independent contractor, which is the question analyzed here and more analogous to the issue presented in NABM.

Finally, I find NABM persuasive. The burden is on the defendant to show that its policy exclusion is "clear and unmistakable." See MacKinnon, 31 Cal.4th at 648. As the NABM court explained, the language of the ERP exclusion is

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[6] While it is true that courts in this Circuit have at times cited to unpublished California decisions, such decisions are considered to have no precedential value. See, e.g., Employers Ins. of Wausau v. Granite State Ins. Co., 330 F.3d 1214, 1220 n. 8 (9th Cir. 2003).

ambiguous at best and may reasonably be interpreted as applying to only employees and not independent contractors. 137 Cal.App.4th at 642 ("the other language of the [ERP] exclusion relates primarily to claims that could only arise in situations of employment, former employment, or prospective employment"). If defendant wishes to exclude independent contractors from coverage, the simple solution is to specifically include such language in its insurance policies. Because the policy as written is unclear and courts are mandated to strictly construe any exclusions to coverage, I find that the ERP exclusion does not apply to independent contractors such as Woo-Ming and Hoyt.[7]

Lastly, defendant argues that the policy excludes any "personal and advertising injury" that arises out of a breach of contract which results in no coverage for the underlying claims because they stemmed from Woo-Ming and Hoyt's

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[7] Defendant points out that plaintiff obtained a separate Employment Practices Liability (EPL) policy that provided coverage, subject to a $100,000 self-insured retention, for employment-related claims such as wrongful termination, discrimination, and defamation. This EPL policy defined covered employees to specifically include independent contractors as long as plaintiff provided indemnification to such contractors in the same manner as its employees. Defendant argues that plaintiff purchased the EPL policy because it understood that the ERP clause would exclude employment-related claims made by independent contractors. That is not necessarily the case. Plaintiff may have purchased the EPL policy to protect itself against employment-related claims from its employees while still having the reasonable expectation, based on the ambiguous language of the ERP exclusion, that independent contractors would be covered under its general liability policy.

employment contracts.[8] Bellasis Declaration, Ex. 2 at 104. While some of the underlying claims arose directly from Woo-Ming and Hoyt's contractual relationship with plaintiff, the duty to defend is triggered whenever there is any potential for coverage. The allegations in Woo-Ming and Hoyt's operative pleadings, created a potential that plaintiff would be liable for publishing defamatory statements against Woo-Ming and Hoyt. Because liability for such statements would constitute the separate tort of defamation and have no relation to any contract between the parties, the "breach of contract" exclusion does not apply.

For the foregoing reasons, I find that Woo-Ming and Hoyt's claims triggered defendant's duty to defend plaintiff. This duty was not extinguished by any of the exclusions from the policy. **IT IS THEREFORE ORDERED** that plaintiff's motion for summary judgment is **GRANTED** and defendant's motion for summary judgment is **DENIED** with respect to plaintiff's breach of contract claim. I do not rule on plaintiff's "insurance bad faith claim" because plaintiff has requested permission to first conduct discovery about this issue and the possibility of such discovery was contemplated at the status conference in February. See Docket Nos. 39 and 43. The parties are **ORDERED** to meet and confer and file a joint statement by **September 28, 2011** discussing the remaining issues in this matter and

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[8] When defendant initially withdrew its defense in the underlying lawsuits, it cited the ERP exclusion and the Golden Eagle case as its reason for not having to provide plaintiff with a defense. Stinson Declaration, Exs. 1 and 2. Defendant did not argue that the "breach of contract" exclusion applied to Woo-Ming and Hoyt's claims and it now raises the exclusion for the first time in its motion.

submitting a joint request for a trial date and pretrial deadlines.

Dated: September 14, 2011

Bernard Zimmerman
United States Magistrate Judge

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